

KRONENBERGER BURGOYNE, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
www.KBInternetLaw.com

KRONENBERGER BURGOYNE, LLP

Karl S. Kronenberger (CA Bar No. 226112)
Jeffrey M. Rosenfeld (CA Bar No. 222187)
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158
karl@KBInternetLaw.com
jeff@KBInternetLaw.com

Attorneys for Plaintiffs UNITED STATES OF AMERICA
CHESS FEDERATION, INC. and RANDALL D. HOUGH

CESARI, WERNER AND MORIARTY

Dennis F. Moriarty (CA Bar No. 118110)
Kristina L. Velarde (CA Bar No. 199299)
360 Post Street, Fifth Floor
San Francisco, CA 94108-4908
Telephone: (415) 391-1113
Facsimile: (415) 391-4626

Attorneys for Counter-Defendants RANDALL HOUGH,
BILL GOICHBERG, BILL HALL, RANDY BAUER AND JIM BERRY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**UNITED STATES OF AMERICA
CHESS FEDERATION, INC., et al,**

Plaintiffs,
v.

SUSAN POLGAR, et al.,

Defendants.

SUSAN POLGAR,

Counter-Plaintiff,

v.

BILL GOICHBERG, et al.,

Counter-Defendants.

Case No. 3:08-CV-05126-MHP

**REPLY TO MOTION TO STRIKE
CLAIMS AGAINST THIRD PARTY
DEFENDANTS GOICHBERG, HALL,
BAUER, BERRY AND COUNTER-
DEFENDANT HOUGH UNDER CAL.
CODE OF CIV. PROC. 425.16 (ANTI-
SLAPP MOTION)**

Date: September 28, 2009
Time: 2:00 pm
Ctrm: 15, 18th Floor

The Honorable Marilyn Hall Patel

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Cal. Civ. Code §425.16 ("Anti-SLAPP statute").....*passim*

INTRODUCTION

Randall Hough, Bill Goichberg, Bill Hall, Randy Bauer and Jim Berry (collectively, “Counter-Defendants”) filed a special motion to strike pursuant to Code of Civil Procedure section 425.16 (“Motion”). Courts employ a two step process in analyzing a special motion to strike. First, a court must determine if a claim is subject to a motion to strike. If the claim is subject to a motion to strike, the burden shifts to the claimant to prove that he or she has a reasonable probability of succeeding on the merits.

Polgar’s counterclaims attack core protected petitioning and communicative activities protected by the anti-SLAPP statute. First, Polgar alleges that Counter-Defendants committed the tort of abuse of process by authorizing and filing this lawsuit. Polgar also alleges that Counter-Defendants breached their supposed fiduciary duties by engaging the same conduct. The case law is clear that such counterclaims—i.e. claims based on the initiation and prosecution of a lawsuit—are subject to a motion to strike under California law. For whatever reason, Polgar ignores this wealth of case law in her opposition.

In the second step of the anti-SLAPP analysis, the claimant must prove a probability of success on the merits, with evidence admissible at trial. Not only did Polgar fail to oppose the Motion with affidavits, she failed to even address the second prong of the analysis or her complete lack of admissible evidence.

Simply put, Polgar has no admissible evidence to support her abuse of process claim. Polgar has submitted no evidence that Counter-Defendants acted with an ulterior motive in using Court processes, which is essential to support her abuse of process claim. Polgar actually cites to legal briefs rather than evidence to support these claims.

Even if Polgar could produce evidence supporting her claims, such evidence could not overcome certain incurable deficiencies. First, the full and comprehensive ratification of the USCF Board of Delegates has rendered Polgar’s counterclaims moot. Second, the litigation privilege completely bars both of Polgar’s counterclaims. When addressing the applicability of the litigation privilege to her counterclaims, Polgar cites an

1 inapposite and overruled authority. Current case law holds that communicative acts in
 2 the petitioning process, as well as non-communicative acts that are related to
 3 communicative acts, are protected under the litigation privilege.

4 In a last ditch effort, Polgar surprisingly claims that, "[t]o date, plaintiffs have not
 5 produced *any* documents in response to Ms. Polgar's document requests." This
 6 statement is false. The USCF has produced 1114 documents to Polgar in this action. It
 7 is unclear why Polgar would make such an obvious misstatement. More importantly,
 8 Polgar has all of the relevant documents in her possession, and accordingly, there is no
 9 reason to delay a decision on this Motion for discovery reasons.

10 Because Polgar's counterclaims attack core petitioning activity protected by the
 11 anti-SLAPP statute, Polgar was required to possess admissible evidence of the
 12 misconduct at the time of filing. Nearly a year later—and several rounds of discovery
 13 later—Polgar can point to absolutely no evidence. The Court must grant Counter-
 14 Defendants' special motion to strike.

15 ARGUMENT

16 **I. Polgar's opposition was filed late and should be disregarded by the Court.**

17 The anti-SLAPP motion to strike was filed on August 24, 2009, noticing, pursuant
 18 to L.R. 7.2(a), a hearing date of September 28, 2009. As per L.R. 7.3(a), Polgar's
 19 opposition was due "not less than twenty-one days before the hearing date," which is
 20 September 7, 2009, a federal holiday. Thus, the court day prior to the due date was
 21 September 4, 2009. Polgar filed her opposition on September 8, 2009, which was four
 22 days late. Accordingly, Polgar's opposition should be struck.

23 **II. Legal standard for an Anti-SLAPP special motion to strike and admissibility** 24 **of evidence.**

25 In considering an "anti-SLAPP" motion to strike under Code of Civil Procedure
 26 section 425.16 (the "anti-SLAPP statute"), courts employ a two-step test. First, the
 27 moving party must make a "prima facie showing" that the challenged claims arise from
 28 an alleged act which was taken "in furtherance of the defendant's right of petition or free

1 speech under the United States or California Constitution in connection with a public
 2 issue." *Equilon v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). Second, the non-
 3 moving party must establish that there is a probability that the non-moving party will
 4 prevail on the challenged claims. Cal. Civ. Proc. Code §425.16(b)(1); see also *1-800*
 5 *Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 584-85 (2003). "In making its
 6 determination, the court shall consider the pleadings, and supporting and opposing
 7 affidavits stating the facts upon which the liability or defense is based." Cal. Civ. Proc.
 8 Code §425.16(b)(2).

9 The claimant's showing of facts must consist of evidence that would be
 10 admissible at trial. *Hall v. Time Warner, Inc.* 153 Cal. App. 4th 1337, 1346 (2007); see
 11 also, *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 80 (2007), on
 12 subsequent appeal at 165 Cal.App.4th 1315 (a claimant cannot rely on allegations of a
 13 complaint, but must produce evidence that would be admissible at trial). Such evidence
 14 must be supported with a proper foundation, including documentary evidence submitted
 15 as attachments to authenticating affidavits. *Tuchscher Development Enterprises, Inc. v.*
 16 *San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1238 (2003) (email printouts,
 17 letters, and handwritten notes were without foundation and thus the court could not
 18 consider them when deciding whether developer had probability of prevailing on claim
 19 which was subject to an anti-SLAPP motion to strike.)

20 **III. Polgar's counterclaims arise from protected activity under California case** 21 **law.**

22 **a. Polgar's abuse of process counterclaim is subject to a motion to strike.**

23 In their Motion, Counter-Defendants point to case law establishing that filing an
 24 abuse of process claim is subject to an anti-SLAPP motion to strike. See *Booker v.*
 25 *Roundtree*, 155 Cal. App. 4th 1366, 66 Cal.Rptr.3d 733 (Cal. App. 4th 2007); see also,
 26 *Jaksch v. Seitz Family Partnership, L.P.*, 2008 WL 2352494 *4 (Cal. App. 4th 2008) ("The
 27 abuse of process cause of action is subject to an anti-SLAPP motion.").

28 Polgar disregards this authority. Instead, Polgar circularly argues that her abuse

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 150 Post Street, Suite 520
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of process counterclaim is “grounded upon” the Counter-Defendants (1) suing Polgar, and (2) conducting discovery in the Doe action before Polgar was named. (Susan Polgar’s Consolidated Opposition to Third Party Defendants and Counter Defendants’ Motion to Strike Claims under Cal Code of Civ. Proc. 425.16 (“Opposition”) at 3.) However, these acts comprise textbook petitioning activity that is subject to a motion to strike under California law. The acts of filing a lawsuit and conducting discovery under that lawsuit are within the purview of petitioning activities protected by California’s anti-SLAPP statute. See *Booker, Jaksch, supra*. Polar ignores this in her Opposition.

Polgar further argues that “[t]he gravamen of Ms. Polgar’s claim is that defendant sought to misappropriate the courts’ compulsory power to unlawfully compel the production of private information claim (sic). Such misconduct neither constitutes the petitioning of the Court nor communicative activity.” (Opposition at 3.) Polgar’s argument fails. First, under *Booker* and *Jaksch*, the Counter-Defendants’ use of the Court’s compulsory power comprises a petitioning activity covered by the anti-SLAPP statute. Second, Polgar cites to inapposite authority in support of her argument; one of Polgar’s cases has been overturned and the other two are not anti-SLAPP cases.

First, Polgar misrepresents the holding of *Drum v. Bleau, Fox & Associates*, 107 Cal. App. 4th 1009 (2003), as it relates to the anti-SLAPP statute, and fails to disclose that *Drum* has been overturned as it relates to the litigation privilege. In *Drum*, the judge stayed the case pending appeal, and, despite the stay, counsel still levied on a bank account of the defendant based on the staid judgment. These actions resulted in an abuse of process claim by the judgment debtor against the attorney for willfully levying upon the bank account despite the stay. The court found that the claim was indeed subject to a motion to strike, and that there was no reasonable probability of success on the merits of the abuse or process claim – so the motion was granted. The appellate court reversed, holding that there was a reasonable probability of success on the merits, even though the claim was subject to a motion to strike. *Drum v. Bleau, Fox & Associates*, 107 Cal. App. 4th 1009, 1021 (2003) (stating at 1018, “the challenged cause

1 of action for abuse of process arises from a protected activity, and is subject to the
2 statute.”) Thus, despite Polgar’s misleading statements, *Drum* supports the accepted
3 tenet that an abuse of process claim is subject to an anti-SLAPP motion to strike.

4 Polgar also fails to disclose that the California Supreme Court has reversed *Drum*
5 on the issue of the litigation privilege. In *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1052
6 (2006), the California Supreme Court held that “where the cause of action is based on a
7 communicative act, the litigation privilege extends to those noncommunicative actions
8 which are necessarily related to that communicative act.” *Id.* Accordingly, “wrongful
9 levying on property pursuant to a writ of execution” was an act protected by the litigation
10 privilege because it was a non-communicative action necessary to the communicative
11 act of petitioning the court. Accordingly, Polgar’s characterization of the law in the area
12 is wrong.¹ Counter-Defendants’ alleged use of noncommunicative actions to effect their
13 communicative acts—the same communicative acts that are the basis of Polgar’s abuse
14 of process claim—fall within the scope of the anti-SLAPP statute.

15 Polgar’s other authority is irrelevant to whether Polgar’s claims are subject to a
16 motion to strike. First, *Ribas v. Clark*, 38 Cal. 3d 355 (1985), addresses only the
17 litigation privilege and does not even involve an anti-SLAPP motion. Not only is this
18 authority misused because it is irrelevant to whether a claim is subject to a motion to
19 strike, but Polgar distorts the relevance of *Ribas*, by not disclosing that *Rusheen*—which
20 precedes *Ribas* by eleven years—supplants the reasoning in *Ribas*. (See, Opposition,
21 at 3.) Regardless of *Rusheen*’s effect on *Ribas*, Polgar’s use of *Ribas* is simply
22 misplaced, as it could only be relevant in the second prong of the anti-SLAPP analysis
23 concerning Polgar’s probability of success on the merits of her claim.

24 Polgar’s remaining authority, *Arc Inv. Co. v. Tiffith*, 164 Cal.App.2d Supp. 853,
25 855 (1958), is similarly inapposite. The case has nothing to do with the anti-SLAPP
26 statute. The case has nothing to do with the litigation privilege. It is unclear why Polgar

27 ¹ Polgar’s parenthetical summary of *Drum*’s holding is: “wrongful levying on property
28 pursuant to a writ of execution is an act, not a communication.” (Opposition, p. 3.)

1 has cited this case in support of her argument that her abuse of process counterclaim is
2 not subject to a motion to strike.

3 ***b. Polgar's fiduciary duty counterclaim is subject to a motion to strike.***

4 Polgar states that "the principal thrust of her breach of fiduciary duty claims is the
5 plaintiffs' breach of their undertaking to comply with the USCF's bylaws." (Opposition, p.
6 4.) Polgar also cites to a laundry list of purported technical violations of the USCF
7 bylaws in support of her argument. (*Id.*)

8 However, in her Opposition, Polgar ignores the lengthy allegations she makes in
9 her actual breach of fiduciary duty counterclaim filed with the Court. In her counterclaim,
10 Polgar alleges as follows:

- 11 • That Counter-Defendants authorized Kronenberger to file the present lawsuit.
12 (Defendant and Counter-Plaintiff Susan Polgar's Second Amended Answer to first
13 Amended Complaint and Amended Counter-Claim ("Polgar Counterclaims") ¶56.)
- 14 • That the decision by Counter-Defendants to file the lawsuit violated the USCF
15 bylaws. (Polgar Counterclaims ¶59.)
- 16 • That Counter-Defendants obstructed Polgar's request for indemnification from the
17 USCF. (Polgar Counterclaims ¶61.)
- 18 • That Counter-Defendants defended themselves in an action filed by Polgar in
19 Texas, without obtaining the approval of the USCF Board of Delegates. (Polgar
20 Counterclaims ¶39.)
- 21 • That Counter-Defendants "purported to self-ratify their above-described
22 misconduct in violation of the USCF bylaws." (Polgar Counterclaims ¶62.)
- 23 • That Counter-Defendants failed to disclose their conflicts of interests before
24 appropriating money for the current litigation. (Polgar Counterclaims ¶63.)

25 Polgar's counterclaims make clear that the principal thrust of her breach of
26 fiduciary duty claim involves the authorization, filing and management of litigation. In her
27 Opposition, Polgar attempts to confuse the matter by creating a laundry list of technical
28

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violations of the bylaws, ignoring the express allegations of her counterclaims. Importantly, “[a] plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action’.” *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294, 308 (2001). A comparison of Polgar’s Opposition to her counterclaims shows a cherry picking of allegations to avoid the obvious fact that Polgar is attacking Counter-Defendants’ petitioning and communicative actions, protected by the anti-SLAPP statute. In fact, the only source of the alleged harm suffered by Polgar was the filing of the lawsuit filed against her, which is subject to a motion to strike. In evaluating whether Polgar’s breach of fiduciary duty claim is subject to a motion to strike, the Court must focus on the specific allegations in the counterclaims. As demonstrated above, the principal thrust of Polgar’s counterclaims involves allegations that are subject to a motion to strike.

In her Opposition, Polgar focuses on her allegation that the Counter-Defendants did not properly handle her request for indemnification, as grounds for her breach of fiduciary duty counterclaim.² Polgar argues that the Counter-Defendants’ actions in allegedly mishandling the indemnification request was not “communicative,” and thus not subject to a motion to strike. (Opposition at 5.) However, the acts of Counter-Defendants in response to Polgar’s indemnification request, which came during litigation, are incidental to Polgar’s long laundry list of claims concerning the Counter-Defendants suing Polgar and managing the litigation against her, which are clearly subject to a motion to strike. Further, Polgar ignores the Counter-Defendants’ argument that the exchange of written correspondence concerning demands for indemnification that specifically reference ongoing litigation are also acts that are subject to anti-SLAPP motions. (See Motion at 6, citing *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App.4th 777, 835 (1996).)

² Polgar’s indemnification request was later unanimously rejected by the full Board of Delegates at the August 8-9, 2009 annual meeting of the Board of Delegates. [D.E. 181]

For these reasons, Polgar's breach of fiduciary duty counterclaim is subject to an anti-SLAPP motion to strike.

IV. Polgar has not submitted evidence that demonstrates a probability that she will prevail on her counterclaims.

As stated above, Polgar must show a probability of success on her counterclaims with evidence admissible at trial. *See, Hall, supra*. Polgar cannot simply rely upon the allegations in her counterclaims. *See Alnor, supra*. Instead Polgar must attach affidavits to her opposition, and any attachments to affidavits must have the proper legal foundation evident in the affidavit. *See Tuchsher, supra* (email printouts without foundation not admissible when deciding whether plaintiff had probability of prevailing on claims) 106 Cal.App.4th 1219, 1238.

Polgar did not file any affidavits in support of her Opposition.³ Instead, Polgar states that she "has already submitted a detailed record" of the evidence supporting her counterclaims, referring to docket entry 53 (at 6-14), docket entry 83 (at 3-9), docket entry 117, and docket entries 118-119. (Opposition at 7.) This reference to prior docket entries is woefully inadequate because it refers the court to literally hundreds of pages of documents to review that were filed in support of unrelated motions or motions that are now moot due to recent events.

- i) Docket Entry 53 (at 6-14), Docket Entry 83 (at 3-9). These documents comprise Polgar's motion to transfer this action to Texas, and her reply to that motion. According to Polgar, these documents contain Polgar's arguments supporting her abuse of process claim. Pages 6-14 of Polgar's motion to transfer contain primary background information on the history of the litigation, and pages 3-9 of Polgar's reply focuses on one hollow argument. Specifically, Polgar argues that the Doe suit must have been brought with an improper motive because

³ Polgar's Opposition is at docket entry 221, which is mislabeled as "AFFIDAVIT in Opposition to Motion to Strike filed by Susan Polgar. (Leigh, Gilbert) (Filed on 9/8/2009)." However, this docket entry is Polgar's Opposition only, and it contains no affidavits.

the USCF gained no evidence in Doe discovery linking Polgar to the email thefts; thus, by process of elimination, the USCF must have an ulterior motive. [D.E. 83, p. 8.] However, the USCF has refuted this allegation in two detailed affidavits, as explained below. Polgar does not make her argument with authenticated documents or other admissible evidence. Polgar's arguments are only submitted by Polgar's attorneys in briefing. Simply put, Polgar has no evidence whatsoever of ulterior motive to support her abuse of process claim.

ii) Docket Entry 117. This document is Polgar's motion for summary judgment based on *ultra vires* acts, filed on June 8, 2009. Again, this is not authenticated, admissible evidence, but instead it is a brief submitted by Polgar's attorney. Moreover, this reference is not helpful because a very significant intervening event has occurred since Polgar filed her motion on June 8, 2009; specifically, the USCF Board of Delegates held their annual meeting on August 8-9, 2009 and, at the meeting, unanimously ratified all prior acts of the USCF Executive Board and the USCF Executive Director related to all outstanding litigation. [D.E. 181.] This ratification is supported by a declaration from the USCF Secretary, Bill Hall. [D.E. 182.]

iii) Docket Entries 118-119. These documents are Polgar's and attorney Matthew Springman's declarations in support of Polgar's motion for summary judgment. In Polgar's declaration, she describes an email that she read on the Internet, but did not attach to her declaration. The email was purportedly an attorney client privileged email between the USCF and its counsel regarding potential termination of Polgar's insurance coverage. [D.E. 118 ¶2.] Importantly, Polgar cannot authenticate the email because she did not attach it; further, even if she would have attached the email, it would not be admissible evidence because a) it is privileged and b) it was stolen. This declaration by Polgar simply is not evidence admissible at trial, and, as such, it should not be considered by the Court. And even if this statement were admissible, it does

1 not come close to satisfying Polgar's burden in an anti-SLAPP motion.
2 Regarding Springman's declaration at docket entry 119, it is unclear what
3 attached documents are relevant for this anti-SLAPP motion, or how Polgar's
4 attorney would have the requisite knowledge to authenticate any relevant
5 documents.

6 In her Opposition Polgar does not submit, or refer to docket entries containing,
7 any actual copies of stolen emails. However, to the extent that other Polgar filings
8 reference any attorney-client privileged emails stolen from the USCF, the USCF has
9 already filed objections to evidence on July 24, 2009 [D.E. 155]. In these objections the
10 USCF formally objects to evidence submitted by Polgar that a) was stolen from the
11 USCF, b) is protected by attorney-client privilege, c) is unauthenticated, and d) is the
12 subject of a recent criminal indictment of Ms. Polgar's business partner and co-
13 defendant, Gregory Alexander. (*Id.* at 1.)

14 Regarding foundation for evidence, it is not sufficient if the witness merely states
15 that he or she is "aware" of the subject matter of his or her testimony. *Ward v. First Fed'l*
16 *Savings Bank*, 173 F.3d 611, 617-18 (7th Cir. 1999); *United States v. Garcia*, 413 F.3d
17 201, 211-13 (2d Cir. 2005). Further, under *Tuchsher, supra*, email printouts without
18 foundation are not admissible when deciding whether a plaintiff had probability of
19 prevailing on claims. 106 Cal.App.4th 1219, 1238. In her declaration at docket entry
20 118, Polgar merely refers to an email that she supposedly read in the past. In a docket
21 entry not referenced by Polgar in her Opposition [D.E. 185, Ex. E], attorney Whitney
22 Leigh attaches a print-out from a doctored –and redacted–email, with no foundation at
23 all provided by Mr. Leigh. As this evidence cannot be authenticated, the Court should
24 not consider this evidence.

25 Further, the stolen email attached to Leigh's declaration is protected by the
26 attorney-client privilege, and should not be considered by the Court. This issue has
27 been fully briefed in the USCF's objections to evidence [D.E. 155], and in the USCF
28 opposition [D.E. 205] to Polgar's recent motion to compel.

1 Lastly, the stolen email attached to Leigh's declaration should be disregarded
2 because it is stolen. The general rule regarding unlawfully obtained evidence in federal
3 court is that such evidence will be excluded when the procurement of the evidence
4 violated federal protections. See *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665-66 (9th
5 Cir. 2003). This issue was also fully briefed in USCF's objections to evidence [D.E. 155].

6 To summarize, Polar has not presented any admissible evidence in support of her
7 Opposition. Polgar's general referral to the prior "record" in this case is simply
8 insufficient. Most of Polgar's arguments are bare statements unsupported by affidavits.
9 Her arguments regarding *ultra vires* acts are made in a motion filed prior to the
10 comprehensive ratification of prior acts by the USCF Board of Delegates. And, finally,
11 many of Polgar's arguments are based upon print-outs of emails that are impossible to
12 authenticate, which have been blatantly altered, which are protected by the attorney-
13 client privilege, and which are the product of a criminal act of theft, and, accordingly,
14 these emails must be disregarded by the Court.

15 ***a. Polgar's abuse of process and fiduciary duty claims are moot due to the***
16 ***comprehensive and unanimous ratification of prior acts and denial of***
17 ***Polgar's indemnification request by the USCF Board of Delegates.***

18 On August 8-9, 2009, the USCF Board of Delegates held its annual meeting. At
19 this meeting, the Board of Delegates unanimously ratified all prior acts of the USCF
20 Executive Board, and of the USCF Executive Director, related to this litigation and
21 Polgar's indemnification requests. (Supplemental Response by Plaintiffs to Civil Minute
22 Order Dated April 13, 2009, RE: a) Comprehensive Ratification of USCF Board of
23 Delegates of all Acts of USCF Executive Board, B) Expulsion of Susan Polgar from the
24 U.S. Chess Federation, and c) Denial of Polgar's Indemnification Requests [D.E. 181] at
25 2.) At the meeting, the Executive Board informed the Board of Delegates about a)
26 multiple Executive Board ratification resolutions made over the past year, b) the
27 allegations by Polgar that that Executive Board members and their counsel had acted in
28 an Ultra Vires manner, c) the allegations by Polgar that Executive Board members were

1 “interested parties” and thus should not manage litigation involving Polgar, d) the
2 allegations by Polgar that conflicts of interest of USCF’s counsel had not been properly
3 disclosed and waived, and e) a significant amount of other background information
4 about the litigation involving the USCF and Polgar pending in multiple states. (*Id.*) After
5 full consideration of the matter, the Board of Delegates unanimously ratified all prior acts
6 of the Executive Board and approved of all conflicts. (*Id.* at 3.)

7 Polgar’s abuse of process and breach of fiduciary duty claims are based largely
8 upon the USCF Executive Board purportedly not having the authority to file the Doe
9 action, amend the action to name Polgar, spending money on litigation without Board of
10 Delegates approval, attempting to “self-ratify” their actions, circumventing organizational
11 procedures and failing to disclose conflicts of interest to the Board of Delegates. (Polgar
12 Counterclaims ¶¶42-47, 56-63.) The Board of Delegates’ unanimous ratification moots
13 all of the forgoing arguments by Polgar.

14 Polgar does not explain why the ratification does not cripple her claims. She
15 states that, “this argument is deeply mistaken,” without providing any authority to support
16 her position. (Opposition at 8.) Accordingly, Polgar’s claims must fail due to the
17 unanimous ratification.

18 ***b. Polgar has not submitted any evidence of ulterior motive for her abuse***
19 ***of process counterclaim.***

20 Polgar has failed to produce any evidence to support her abuse of process claim.
21 “To succeed in an action for abuse of process, a litigant must establish two elements:
22 that the defendant (1) contemplated an ulterior motive in using the process; and (2)
23 committed a willful act in the use of the process not proper in the regular conduct of the
24 proceedings.” *Brown v. Kennard*, 94 Cal.App.4th 40, 44 (2001); *see also, Oren Royal*
25 *Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal.3d 1157, 1168
26 (1986) (explaining that an ulterior purpose is a fundamental element of the tort of abuse
27 of process).

28 Simply put, Polgar has no evidence of ulterior motive to support her claim.

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 150 Post Street, Suite 520
 San Francisco, CA 94108
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1 Instead, she relies entirely on unsupported argument and innuendo. Polgar argues that
 2 because she knows of no new evidence that was obtained between the filing of the Doe
 3 complaint and the amendment of the complaint to add her as a party, that there must
 4 have been an ulterior motive behind the original complaint. This argument is insufficient.
 5 Moreover, Polgar completely ignores two declarations that directly controvert her claim.
 6 USCF Executive Director Bill Hall and attorney Karl Kronenberger both submitted
 7 declarations in support of their anti-SLAPP motions that explained a) that there was no
 8 intent to name Polgar as a defendant at the time the Doe complaint was filed; b) that
 9 with its Doe discovery the USCF discovered that Gregory Alexander, Polgar's business
 10 partner and agent, gained unauthorized access to Hough's email account; and c) that
 11 Alexander's theft in combination with Polgar's exclusive possession of the stolen emails
 12 formed a good faith basis for naming Polgar and Alexander as defendants. (Declaration
 13 of Bill Hall in Support of Anti-SLAPP Motion ¶3 [D.E. 197]; Declaration of Karl
 14 Kronenberger in Support of Anti-SLAPP Motion ¶2 [D.E. 212].) Polgar has no evidence
 15 of ulterior motive, and accordingly her abuse of process claim must fail.

16 **V. The USCF has turned over all relevant discovery documents to Polgar, and**
 17 **accordingly there is no reason to delay a decision on the Motion.**

18 Polgar claims that she "has not had a fair opportunity to conduct discovery of her
 19 claims" and that "plaintiffs have improperly withheld discovery related to those claims."
 20 (Opposition at 6.) Shockingly, Polgar then asserts that, "[t]o date, plaintiffs have not
 21 produced *any* documents in response to Ms. Polgar's document requests." (Opposition
 22 at 7.) (emphasis by Polgar's counsel.)

23 Polgar's assertion is false, and it is unclear why Polgar's counsel would make
 24 such a statement. The USCF has produced 1114 documents to Polgar in this action,
 25 which include both paper documents and media files. (Declaration of Karl Kronenberger
 26 in Support of Reply to Motion to Strike Claims Against Third Party Defendants
 27 Goichberg, Hall, Bauer, Berry and Counter-Defendant Hough Under Cal. Code of Civ.
 28 Proc. 425.16 (Anti-SLAPP Motion) ("Kronenberger Decl.") ¶2.) These documents have

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1 been Bates-Numbered USCF000001-USCF001114. (*Id.* & Ex. A.) Recent document
 2 productions have included exactly what Polgar has requested, including documents
 3 related to USCF Executive Board meetings after April 12, 2009, documents provided to
 4 the USCF delegates at the annual meeting in August 2009 related a) to the delegates'
 5 later unanimous ratification of all acts related to all outstanding litigation, b) to the
 6 delegates unanimous denial of Polgar's indemnification request, and c) to the expulsion
 7 of Polgar and Truong from the USCF. (*Id.* ¶3 & Ex. A.) The USCF has provided Polgar
 8 with all of the documents provided to the USCF Board of Delegates for the August 8-9,
 9 2009 annual meeting, even though she was already in possession of most if not all of
 10 those documents. (*Id.* ¶4. & Ex. A.) Further, Polgar's counsel has admitted that he has
 11 access to video of the annual meeting, available on a third party website, even though
 12 Polgar and her counsel, Whitney Leigh, actually attended the meeting. (*Id.* ¶5.)

13 The documents provided to Polgar in this case are in addition to the 13,617
 14 pages of documents produced to Polgar in the Texas action. The USCF has also
 15 produced 47 videos and 17 audio recordings to Polgar in the Texas action. (*Id.* ¶6 & Ex.
 16 A.)

17 The only documents that Polgar does not have in her possession are attorney
 18 client privileged documents relating to the USCF's litigation against Polgar in both
 19 California and Texas. Polgar's attempt to obtain these privileged documents is a last
 20 ditch effort to gin up evidence where none exists.

21 **VI. Discovery is stayed unless Polgar can show good cause to obtain more**
 22 **discovery for her anti-SLAPP opposition.**

23 To survive a special motion to strike, Polgar must be in possession of evidence
 24 supporting her claim at the time of filing. Thus, under Code of Civil Procedure §
 25 425.16(g), all discovery is staying upon the filing of an anti-SLAPP motion to strike.

26 While Polgar has cited the Ninth Circuit case of *Metabilife Int'l v. Wornich*, 264
 27 F.3d 832 (9th Cir. 2001) for the proposition that section 425.16(g) does not apply in
 28 federal court, the Ninth Circuit has clarified its ruling in the later case of *Batzel v. Smith*

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 150 Post Street, Suite 520
 San Francisco, CA 94108
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by stating, “[i]f the defendant files an anti-SLAPP motion to strike, all discovery proceedings are stayed. See § 425.16(g). A court may, however, permit specified discovery ‘on noticed motion and for good cause shown.’ *Id.*” *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir.2003). This clarification has also been recognized by at least one federal district court in California. *New.Net, Inc. v. Lavasoft*, 356 F.Supp.2d 1090, 1101 (C.D.Cal. 2004) (“A recent Ninth Circuit decision also recognized that, in connection with proceedings under the anti-SLAPP statute, the court may permit specified discovery on noticed motion and for good cause shown.”), *citing*, *Batzel* at 1024. Another district court in California has explained that *Metabolife’s* holding is that undiscovered facts must be essential to plaintiff’s argument before a court may grant plaintiff discovery rights after a special motion to strike has been filed by a defendant. *Four Navy Seals v. Associated Press*, 413 F.Supp.2d 1136, 1149 (S.D. Cal. 2005).

While admittedly the USCF has not turned over any attorney-client documents to Polgar, Polgar cannot explain how such attorney-client privileged documents that she seeks are somehow essential to Polgar’s argument. Polgar’s remaining arguments regarding discovery ring hollow, particularly where Polgar herself is in possession of the evidence supporting her claims.

Respectfully submitted,

Dated: September 14, 2009

KRONENBERGER BURGOYNE, LLP

By: s/ Karl S. Kronenberger
 Karl S. Kronenberger

Attorneys for UNITED STATES OF
 AMERICA CHESS FEDERATION, INC.
 and RANDALL D. HOUGH

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1 Dated: September 14, 2009

CESARI, WERNER AND MORIARTY

2
3 By: s/ Kristina L. Velarde
4 DENNIS F. MORIARTY
KRISTINA L. VELARDE

5 Attorneys for BILL GOICHBERG, BILL
6 HALL, RANDY BAUER, JIM BERRY and
7 RANDALL D. HOUGH
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KRONENBERGER BURGOYNE, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
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